LIBRARY
PREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
MAY 8 1968
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1396

STEVENS INDUSTRIES, INC.,

Petitioner

versus

MARYLAND CASUALTY COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EMMET J. BONDURANT
A. G. CLEVELAND, JR.
Attorneys for Appellant

OF COUNSEL:

KILPATRICK, CODY, ROGERS, MCCLATCHEY & REGENSTEIN
1045 Hurt Building
Atlanta, Georgia 30303

PERRY, WALTERS, LANGSTAFF & LIPPITT
409 North Jackson Street
Albany, Georgia 31701

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	5
I. The lower courts defined the term "accident" in a manner which is inconsistent with the decisions of the Georgia courts, which under Erie were controlling, and in a manner which conflicts with the decisions of other Circuits.	
II. The declaration that the insurer was under no obligation to pay any judgments which might be rendered against Stevens presented only an abstract hypothetical controversy which was beyond the jurisdiction of the lower courts under Article III.	
CONCLUSION	17
PROOF OF SERVICE	18
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1
APPENDIX D	D-1

TABLE OF AUTHORITIES

Case	Page
Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937)	16
Aetna Casualty & Surety Co. v. Starrett, 102 Ga.App. 278, 115 S.E.2d 641 (1960)	8
Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461-62 (1945)	16
Fortson v. Toombs, 379 U.S. 621, 633 (1965)	16
American Employer Ins. Co. v. Knox-Tenn. Equipment Co., 52 Tenn.App. 643, 377 S.W.2d 573 (1963)	11, 12
Atlanta Accident Ass'n v. Alexander, 104 Ga. 709, 30 S.E. 939 (1898)	8
Bowman Steel Corporation v. Lumbermen's Mutual Casualty Company, 364 F.2d 246, 250 (3rd Cir. 1966)	11, A-8, B-6
Bryant v. Citizens Mutual Automobile Ins. Co., 4 Mich.App. 596, 145 N.W.2d 410, 412-13 (1966)	11
Bundy Tubing Company v. Royal Indemnity Company, 298 F.2d 151, 152-53 (6th Cir. 1962)	11, A-8, B-6
G. Bernd Company v. Rahn, 94 Ga.App. 713, 96 S.E.2d 185 (1956)	15
Central Surety & Ins. Corp. v. Caswell, 91 F.2d 607 (5th Cir. 1937)	14

Case — Page

Central Surety & Ins. Corp. v. Norris, 103 F.2d 116 (5th Cir. 1939), cf 14

Dakota Block Company v. Western Casualty Surety Company, 132 N.W.2d 826 (S.D. 1965) 11, A-8, B-6

Economy Mills, of Elwell, Inc. v. Motorists Mutual Ins. Co., 8 Mich.App. 451, 154 N.W.2d 659 (1967) ... 11, B-6

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) . 6, B-4

Geddes & Smith, Inc. v. Saint Paul-Mercury Indemnity Co., 51 Cal.2d 558, 334 P.2d 881, 884 (1959) ... 11

Green v. Aetna Insurance Co., 349 F.2d 919 (5th Cir. 1965) 13, 14, 15, B-11

E. K. Hardison Seed Company v. Continental Casualty Co., 410 S.W.2d 729 (Tenn.App. 1966) 12, B-9

Hauenstein v. St. Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122, 126 (1954) .. 11, A-8, B-6

Johnson v. Aetna Life Ins. Co., 24 Ga.App. 431, 101 S.E. 134 (1919) 8

Johnson v. National Life & Accident Ins. Co., 92 Ga.App. 818, 90 S.E.2d 36 (1955) 8

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154-55 (1951) 16

Loftin v. United States Fire Ins. Co., 106 Ga.App. 287, 127 S.E.2d 53 (1962) 13, B-5

Case — Page

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941) 14

Pittsburgh Plate Glass Company v. Fidelity and Casualty Company of New York, 281 F.2d 538 (3rd Cir. 1960) 11, A-8, B-6

Pacific Mutual Life Ins. Co. v. Meldrim, 24 Ga.App. 487, 490, 101 S.E. 305, 307 (1919) 8

Poe v. Ullman, 367 U.S. 497, 506 (1961) 16

Royal Indemnity Co. v. Kuhr, 113 Ga.App. 39, 147 S.E.2d 23 (1966) 8

Shelby Mutual Insurance Co., of Shelby, Ohio v. Ferver Sheet Metal Works, Inc., 156 So.2d 748 (Fla.App. 1963) 11

St. Paul Fire & Marine Ins. Co. v. Northern Grain Co., 365 F.2d 361 (8th Cir. 1966) 6, 9, B-7

St. Paul-Mercury Indemnity Company v. Sugarland Industries, Inc., 406 S.W.2d 778 (Tex.Civ.App. 1966) 12, B-9

United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947) 16

United States v. State of West Virginia, 295 U.S. 463, 475 (1935) 16

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No.

STEVENS INDUSTRIES, INC.,

Petitioner

versus

MARYLAND CASUALTY COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Stevens Industries, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 7, 1968.

OPINIONS BELOW

The opinion of the District Court is unreported and is printed in Appendix A hereto. The opinion of the Court of Appeals is, as yet, unreported and is printed in Appendix B hereto. R. 241.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1968. R. 255. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether the lower courts erred in defining the term "accident" as used in the respondent's comprehensive

policy in a manner which was in conflict with the decisions of the Georgia courts, which under *Erie* were controlling, and which also conflicted with a decision of the Eighth Circuit, by imposing the additional requirement that the damage be accompanied by some action, movement or change, and on this basis, excluding coverage of damage claims based on an unexpected failure of peanut seeds sold by petitioner to germinate and produce normal crop yields due to the presence of excessive mercury.

(2) Whether the lower courts exceeded their jurisdiction conferred by Article III of the Constitution by granting a declaratory judgment relieving Maryland Casualty of any duty to pay any judgments which might thereafter be rendered against its insured, even though the factual and legal basis for such judgments had not and could not have been finally determined and were uncertain.

STATEMENT

This declaratory judgment action was brought against Stevens Industries by its products liability insurer seeking a declaration that Maryland Casualty was under no obligation under its Comprehensive Liability Policy (1) to defend suits against Stevens or (2) to pay any judgments which might be rendered against Stevens arising from Stevens' overtreatment of seed peanuts with a mercury compound. Jurisdiction of the district court was based on diversity of citizenship. Throughout the proceedings Stevens has maintained that the complaint presents only an abstract hypothetical controversy which is not appropriate for declaratory relief because the facts are not sufficiently definite and concrete to permit the entry of a specific decree, which will constitute a complete determination of the rights of the parties, particularly in the absence of the claimants who are necessary parties. R. 41, 47, 51.

Petitioner Stevens Industries is engaged in the manufacture, processing and sale of agricultural products, including the processing and sale of peanuts for use as seed by farmers throughout the southwest Georgia area. Respondent issued a Comprehensive Liability Policy insuring Stevens against all claims for personal injuries (Coverage A) or property damages (Coverage C) "caused by accident" arising from the manufacture, processing and sale by Stevens of its products, including the peanuts which it processed and sold for use as seed.[1] R. 9-10. Claims for breach of warranty were expressly covered by the policy R. 9-10, but under the Products Hazard provisions of the policy, coverage of such claims was limited to those "accidents" occurring after the seeds had left the premises of the insured. R. 9-10. Maryland Casualty received a specific premium of $71.00 for insuring Stevens against claims for property damage arising from its sale of seed peanuts. R. 24.

From March until May, 1965, while the Comprehensive Liability Policy was in force, seed peanuts were treated by Stevens Industries with an excessive quantity of a mercury compound and were sold to farmers throughout the southwest Georgia area. During this period large numbers of farmers complained to Stevens Industries that, as a result of the presence of excessive mercury compound with which the seeds had been treated, the young peanut plants which developed from the germination of the seed either died or failed to develop sufficiently to produce normal yields of peanuts. R. 48, 100,

---

[1] The pertinent provisions of the Comprehensive Liability Policy are reproduced in Appendix C.

130, 198, 208.[2] The farmers asserted damages based on a reduction in crop yields and in many instances, also made claims for itemized expenses such as the replacement of seed, herbicides, insecticides, fertilizer, land rent and land preparation, as well as costs of herbicide and insecticide application. Some farmers also claimed damages based on the destruction of their growing crops. Although a large number of the farmers have threatened to file suits against Stevens, only one former had actually filed suit at the time of the decision of the district court.

Maryland Casualty denied coverage of all of the claims under its Comprehensive Liability Policy and brought this action for declaratory judgment against Stevens. Stevens' motions to dismiss the action as presenting a non-justiciable hypothetical controversy beyond the Article III jurisdiction of the district court, and for failure to join the claimants as necessary parties to the action, were denied by the district court which granted a summary judgment relieving Maryland Casualty of any duty to defend the farmers' claims or to pay any judgments which might thereafter be rendered against Stevens Industries. Appendix A, 10-11.

In denying coverage under the policy, the district court defined the term "accident" as used in the policy as excluding coverage of the mere unexpected or unforeseen failure of the seeds to produce a normal yield of peanuts, which was unaccompanied by what the court held to be

---

[2] There are indications that the lower courts considered the farmers' claims to involve only the mere passive failure of the peanut seeds to germinate. However, as is demonstrated by the excerpts from the record which are reproduced as Appendix D, the farmers were not complaining merely that the peanut seeds remained lifeless or inert after having been planted. To the contrary, while the failure of some of the seeds to germinate was admitted, the farmers' principal complaint was that the seeds processed by Stevens did germinate—that is, they sprouted, grew and developed into peanut plants—but as a result of the presence of excessive mercury, the young peanut plants either died or failed to develop sufficiently to produce a normal yield of peanuts.

the additional requirement, that the damage be caused by some affirmative action, movement or change. Appendix A, 6. Treating the farmers' claims as involving solely a failure of the seeds to germinate, the district court held that the claims did not involve an "accident" occurring after possession of the seeds had been relinquished by Stevens, which was covered under the Products Hazard provisions of the policy. The court said that:

> ". . . the word 'accident' connotes something affirmative—not negative, something active—not passive. In this connection it is noted that it is not something that these seeds did that is complained of, it is something that they did not do. As we see it, the failure of the seeds to germinate was not an accident within itself, it was simply the result of an accident which occurred at the processing plant. The failure was not itself an accident, although the result was obviously unexpected." Appendix A, 6-7.

The decision of the district court was affirmed by the Court of Appeals which said:

> "The district court based its finding that the failure of the seeds to properly germinate and produce did not constitute a distinct accident within the meaning of the policy on the rationale that the word 'accident' is a term 'of movement, of change . . . something affirmative—not negative, something active—not passive . . . We agree with the reasoning of the District Judge that the failure of the seeds to germinate properly was not an accident . . ." Appendix B, 5-7.

It is this decision of which petitioner seeks review by petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the coverage of comprehensive liability policies because of the conflict between the narrow interpretation of the term "accident" applied by the lower courts in the present case and the more liberal definition given to the term "accident" by the Georgia courts in similar cases, whose decisions under *Erie* were controlling, and by the Eighth Circuit in *St. Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361 (8th Cir. 1966). The decision below also presents fundamental questions as to the scope of the Declaratory Judgment Act within the confines of Article III of the Constitution. More specifically the question is whether a controversy between a liability insurer and its insured involving questions of coverage is ripe for adjudication by declaratory judgment where the issue of coverage is dependent upon the nature of the insured's ultimate liability to third persons and cannot be finally determined until the entry of a judgment against the insured. These questions should be resolved by this Court.

I.

The lower courts defined the term "accident" in a manner which is inconsistent with the decisions of the Georgia courts, which under Erie were controlling, and which also conflicts with the decisions of other Circuits.

The Court of Appeals recognized that Georgia law was controlling under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and that it was required to decide this case "as the Georgia courts would decide it if confronted with these facts." Appendix B, 4-5. It denied coverage under the policy, however, based on a definition of the term "accident" which is plainly more restrictive than that applied by the Georgia courts in insurance cases.

Treating the farmers' claims as involving merely the

unexpected failure of the seeds to germinate,[3] the Court of Appeals held the farmers' claims of damage to their crops to be beyond the coverage of the policy as not constituting an "accident". The court held that in order to qualify as an "accident" under the policy, the injuries to the farmers' crops must have been not only unexpected, unforeseen or unanticipated, these injuries must also be accompanied or caused by some form of affirmative action, movement or change. It said:

> "The word 'accident' is a term 'of movement, of change . . . something affirmative—not negative, something active—not passive." Appendix B, 5.

On this basis, the Court of Appeals held that "the failure of the seeds to germinate properly was not an accident, but rather was the result of the accident which happened at the plant when the seeds were on the premises of the insured." Appendix B, 7.

This restrictive definition of the term "accident" as requiring some affirmative observable movement or change in the seeds after leaving Stevens' premises, and excluding coverage of the damages to the farmers' crops resulting from the unanticipated and unforeseen failure of the seeds to germinate as expected, is in clear conflict with the decisions of the Georgia courts. The Georgia courts have emphasized that the term "accident" as used in contracts of insurance, is "presumed to be employed in [its] ordinary and popular sense as meaning *happening by chance; unexpectedly taking place . . . an event which takes place without the foresight or expectation* of the person acted upon or affected by the event . . . an event

[3] This interpretation of the farmers' claims plainly is in conflict with the record, pertinent portions of which are excerpted as Appendix D. Any doubt as to the full meaning of or the inferences to be drawn from the farmers' claims could not be resolved against Stevens in a motion for summary judgment.

which, under the circumstances, is unusual and not expected to the person to whom it happens," *Pacific Mutual Life Ins. Co. v. Meldrim,* 24 Ga.App. 487, 490, 101 S.E. 305, 307 (1919) (emphasis supplied); *Atlanta Accident Ass'n v. Alexander,* 104 Ga. 709, 30 S.E. 939 (1898); 10 Couch, *Insurance* (2d Ed) §41:6. An unexpected event or happening resulting in damage is no less an accident because caused by negligence of the insured. *Aetna Casualty & Surety Co. v. Starrett,* 102 Ga.App. 278, 115 S.E.2d 641 (1960); *Royal Indemnity Co. v. Kuhr,* 113 Ga.App. 39, 147 S.E.2d 23 (1966).

The Georgia courts have never held that "action," "movement" or "change" are prerequisites to the existence of an accident. All that is required by the Georgia courts for an injury to be "accidental" is that "something unforeseen, unexpected or unusual occurred." *Johnson v. Aetna Life Ins. Co.,* 24 Ga.App. 431, 101 S.E. 134 (1919). This definition of accident was emphasized by the Georgia Court of Appeals in *Johnson v. National Life & Accident Ins. Co.,* 92 Ga.App. 818, 90 S.E.2d 36 (1955), in which in discussing the distinction between "accidental injuries" and injuries caused by "accidental means" in insurance policies, the court said:

> There is a very definite distinction between "accidental injuries" and "injuries resulting from accidental means." Where an injury is *unexpected* but arises from a voluntary action *it is an "accidental injury,"* but for an injury to result from accidental means, it must be the *unexpected* result of an *unforeseen or unexpected act* which was involuntarily and unintentionally done. *Cobb v. Preferred Mutual Accident Assn. of N. Y.,* 96 Ga. 818, 22 S.E. 976; *Fulton v. Metropolitan Casualty Insurance Co.,* 19 Ga.App. 127, 19 S.E. 228; *Johnson v. Aetna Life Insurance*

> *Co.*, 24 Ga.App. 431, 433, 101 S.E. 134; *Continental Casualty Co. v. Pittman*, 145 Ga. 641, 89 S.E. 716; *Westmoreland v. Preferred Accident Insurance Co., C.C.*, 75 F. 244; *Atlanta Accident Ass'n v. Alexander*, 104 Ga. 709, 30 S.E. 939, 42 L.R.A. 188. (Emphasis supplied)

Similarly, the General Assembly of Georgia has defined the word "accident" as used in all legislative enactments in Georgia as meaning no more than an unexpected or unforeseen event. Thus, Georgia Code Section 102-103 expressly provides:

> "**Meaning of certain words.** The following meanings shall be given to the following words in all statutes, unless a different meaning is apparent from the context:
>
> * * * *
>
> **Accident** is an event that takes place without one's foresight or expectation; that which takes place or begins to exist without design."
>
> * * * *

The Fifth Circuit's narrow definition of the term accident is also in conflict with the decision of the Court of Appeals for the Eighth Circuit in *St. Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361 (8th Cir. 1966). In the *Northern Grain* case, reduced crop yields received by farmers as a result of Northern's mistaken sale of improper wheat seed were held to be "accidents" occurring off the premises of the insured within the meaning of the products hazard provisions of a comprehensive liability policy virtually identical to the policy involved in the present case. The district court rejected the insurer's contention that the farmers' crop losses were not "accidents" and held that "it was an unexpected and unforeseen happening and was an 'accident' within the meaning of that term as used in the insuring agreement of the policies," and accordingly held the claims to be covered. 365 F.2d at 364.

Affirming this decision, the Court of Appeals emphasized that:

> "The cases do not support the claim of no accident; indeed a wealth of authority sustains the conclusion that an accident occurred. This court has recognized that the word 'accident' has never acquired any technical signification in law, and when used in insurance contracts, it is to be construed and considered according to the ordinary understanding and common usage of people generally. [citations omitted] '* * * *the courts are practically agreed that the words "accident" and "accidental" mean that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual and unforeseen.'* " 365 F.2d at 364. (Emphasis supplied).

Accordingly, the Eighth Circuit held that:

> "In light of the broad and liberal judicial interpretation of the term 'accident' as used in general liability policies, particularly in a policy which, as is true here, insures against 'Products Hazard,' we are of the firm view, and so hold, that the occurrence under consideration satisfies the requirement that the claimed damages were caused by accident. The result flowing from the sale of the improper seed wheat was an unexpected, unforeseen and fortuitous event. Moreover, it seems clear that . . . the 'accident' here occurred when the damage to the wheat crop of Northern's customers appeared." 365 F.2d at 365.[4]

[4] In view of this language, the Fifth Circuit's attempt to distinguish the *Northern Grain* case on the ground that "The Court in Northern Grain failed to explicitly state whether it was finding an occurrence, an accident or both . . ." seems disingenuous.

Likewise, the Michigan Court of Appeals in *Economy Mills of Elwell, Inc. v. Motorists Mutual Ins. Co.*, 8 Mich. App. 451, 154 N.W.2d 659 (1967) held similar claims against a seed distributor arising from the unexpected and unexplained failure of cranberry seeds to "flower, pod and mature" to be covered as an "accident" occurring after the insured had relinquished possession of the seeds, within the meaning of a comprehensive liability policy similar to that involved in the present case.

A series of cases involving coverage of different kinds of products under the products hazard provisions of liability policies have interpreted the term "accident" in a manner similar to the *Northern Grain* and *Economy Mills* cases, as including all damages which result from an "unexpected or unforeseen happening" without regard to whether the cause was active or passive or even "known or unknown." *Hauenstein v. St. Paul Mercury Indem. Co.*, 242 Minn. 354, 65 N.W.2d 122, 136 (1954). See e.g. *Bowman Steel Corporation v. Lumbermen's Mutual Casualty Company*, 364 F.2d 246, 250 (3rd Cir. 1966); *Dakota Block Company v. Western Casualty Surety Company*, 132 N.W.2d 826 (S.D. 1965); *Pittsburgh Plate Glass Company v. Fidelity and Casualty Company of New York*, 281 F.2d 538 (3rd Cir. 1960) (implicit); *Bundy Tubing Company v. Royal Indemnity Company*, 289 F.2d 151, 152-53 (6th Cir. 1962); *Geddes & Smith, Inc. v. Saint Paul-Mercury Indemnity Co.*, 51 Cal. 2d 558, 334 P.2d 881, 884 (1959); cf *Bryant v. Citizens Mutual Automobile Ins. Co.*, 4 Mich.App. 596, 145 N.W.2d 410, 412-13 (1966); *American Employers Insurance Co. v. Knox-Tenn Equipment Co.*, 52 Tenn.App. 643, 377 S.W.2d 573 (1963); *Shelby Mutual Insurance Co. of Shelby, Ohio v. Ferber*

Sheet Metal Works, Inc., 156 So.2d 748 (Fla.App. 1963).[5]

The contrary interpretation of the term accident by the lower courts is erroneous and should be reviewed by this Court.

II.

The declaration that the insurer was under no obligation to pay any judgments which might be rendered against Stevens presented only an abstract hypothetical controversy which was beyond the jurisdiction of the lower courts under Article III.

In granting a declaratory judgment relieving Maryland Casualty from the duty to pay any judgments which

---

[5] The decisions in *E. K. Hardison Seed Company v. Continental Casualty Co.*, 410 S.W.2d 729 (Tenn.App. 1966) and *St. Paul-Mercury Indemnity Company v. Sugarland Industries, Inc.*, 406 S.W.2d 788 (Tex.Civ.App. 1966) relied upon by the Court of Appeals, are readily distinguished. In the *Hardison* case, an employee of a seed dealer misrepresented that its lima bean seeds would produce green lima beans, when in fact, they produced a high percentage of unmarketable white beans. In holding that the customer's production of white beans was not an *unforeseen* accident, the court emphasized that there was "no suggestion that [the customer] did not get the seed it ordered . . . nor is there any suggestion that the Seed Company *ignorantly* or *accidentally* shipped some other seed than that which was ordered. In fact, there was nothing to suggest an accident. There is simply an alleged misrepresentation of quality." 410 S.W.2d at 735. (Emphasis supplied). Compare *American Employer Ins. Co. v. Knox-Tenn. Equipment Co.*, 52 Tenn.App. 643, 377 S.W.2d 573 (1963) in which damages incurred by a customer resulting from its attempt to use a drill bit of the wrong size mistakenly shipped by the insured was held to be an accident which was covered under a products liability policy. Nor is the decision in *St. Paul-Mercury Insurance Co. v. Sugarland Industries, Inc.*, 406 S.W.2d 778 (Tex.Civ.App. 1966) more in point. In that case, Sugarland sought to obtain coverage as an "accident" of a damage judgment for crop losses sustained by a farmer as a result of the unexplained failure of cotton seeds to germinate at the rate of 80% as expressly represented by Sugarland. Emphasizing that the prior action against Sugarland had been based not upon any unforeseen mishap, but upon "a *knowing fraudulent misrepresentation* of the germination rate" and that "there were no pleadings nor findings nor evidence of negligence or accident after [the customers] received the seed," the court held that the judgment was not covered under the policy. 406 S.W.2d at 782-83.

might thereafter be rendered against Stevens Industries arising from the sale of peanuts, the lower courts clearly exceeded the "case or controversy" limitations upon jurisdiction imposed by Article III of the Constitution. The decision below is also in direct conflict with the decision of another panel of the same court in *Green v. Aetna Insurance Co.*, 349 F.2d 919 (5th Cir. 1965), which reversed a declaratory judgment granted in a products liability case under similar circumstances.

The petitioner does not here contest the jurisdiction of the district court to determine, in a declaratory judgment action, the duty of Maryland Casualty *to defend* the claims which have been made against Stevens Industries arising out of its alleged over-treatment of seed peanuts with mercury. Since the duty of the insurer to defend such claims is dependent upon the nature of the claims themselves, and not upon the underlying facts or the ultimate liability of Stevens Industries to the claimants [*Loftin v. United States Fire Ins. Co.*, 106 Ga.App. 287, 127 S.E.2d 53 (1962)], the controversy was sufficiently concrete and definite to permit such a determination. See *Green v. Aetna Insurance Co.*, 349 F.2d 919 (5th Cir. 1965). Petitioner does contest, however, the jurisdiction of the district court to adjudicate and finally determine in a declaratory judgment action the duty of the insurer *to pay any judgments* which may be rendered against Stevens at some future time. Unlike the duty of the insurer to defend, the duty of the insurer to pay such judgments is not to be determined on the basis of what is claimed, but whether the facts as ultimately determined by a judgment against the insured are within the coverage of the policy. *Green v. Aetna Insurance Co.*, 349 F.2d 919, 924-28 (5th Cir. 1965). The facts constituting the basis for the insured's liability to the farmers cannot be known in advance of such a judgment, nor can they be authoritatively determined in a declaratory judgment

action to which the injured claimants are not parties. See *Central Surety & Ins. Corp. v. Caswell*, 91 F.2d 607 (5th Cir. 1937); *Central Surety & Ins. Corp. v. Norris*, 103 F.2d 116 (5th Cir. 1939), cf. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); 6A Moore, *Federal Practice* ¶57.25. Such a determination in advance of judgment can be no more than what another panel of the Fifth Circuit has appropriately described as an "interesting, but academic declaration about things that may never be." *Green v. Aetna Ins. Co.*, 349 F.2d 919, 928 (5th Cir. 1965). It is the very antithesis of a "case on controversy" which is within the jurisdiction of the federal courts under Article III.

Such an attempt to determine a products liability insurer's duty to pay any judgments which may be rendered against its insured, based on what the lower courts may *believe* the basis of such judgments will be, is replete with uncertainties. These uncertainties are particularly apparent in the present case. For example, while the farmers' claims described results of the excessive mercury—that is, that some of the seeds failed to germinate while others sprouted, grew and developed into peanut plants which either died or failed to mature sufficiently to produce a normal yield of peanuts (see Appendix D), there is absolutely nothing in the record to show *when* or *how* the mercury actually affected the seeds. The lower courts seem to have assumed that the mercury killed the seeds instantly upon application at Stevens' plant; however, the physical evidence described by the farmers shows clearly that a large majority of the seeds were not inert and lifeless at the time of sale, but were injured by the mercury only after they had been planted, sprouted and began to grow into plants which then died or failed to produce. See Appendix D. Whether either hypothesis is correct is only a matter of conjecture. Yet, the determination of the vital question of coverage under the

policy turned upon whether the "accident" occurred before or after delivery of the seeds by Stevens Industries.

Likewise, because of the hypothetical context in which the farmers' claims were considered, the Court of Appeals could conceive only a single legal basis for the farmers' claims against Stevens which it held "must, of necessity, be based upon a breach of either an express or implied warranty." Appendix B, 11. It is clear, however, that the farmers might sue in tort for negligence, based on contentions that Stevens Industries negligently overtreated the seeds with mercury at its plant and that this negligence resulted in damage when the excessive quantities of mercury came into contact with the plants after the seeds had sprouted and begun to grow. See e.g., *G. Bernd Company v. Rahn*, 94 Ga.App. 713, 96 S.E.2d 185 (1956). If Stevens were ultimately held liable to the farmers on such a basis, a strong case for coverage as an "accident" would be presented even under the restrictive definition of that term adopted by the lower courts.

Despite these uncertainties regarding Stevens' ultimate liability to the farmers, the district court entered the broadest possible judgment declaring "that Maryland Casualty is not liable to pay *any* judgment obtained or any compromise made arising out of any claim . . ." made by farmers or dealers against Stevens Industries "because of an alleged overtreatment of said seed peanuts with a mercury compound." R. 233. Such a judgment relieving Maryland Casualty of all liability for judgments which may later be rendered against Stevens Industries, will be *res judicata* between the parties, irrespective of the nature of the evidence, the damages or theories of recovery which might later be developed [*Green v. Aetna Insurance Co.*, 349 F.2d 919, 927 (5th Cir. 1965)], and can be sustained only if a negative was established by the insured—that "*no* state of facts could

be proved which would (a) impose liability on the Assured and (b) simultaneously come "within the coverage of the policy." *Green v. Aetna Insurance Co.*, 349 F.2d 919, 926 (5th Cir. 1965). As the court held in the *Green* case, "the record certainly did not permit a determination as a matter of law that under no possible state of facts could a claim within [the coverage of the policy] be made out." 349 F.2d at 926.

From what has been said, it is clear that the declaration entered by the lower court did not involve "an adjudication of present right upon established facts" as to past events as in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937), but presented merely an abstract hypothetical controversy which was, and is, dependent upon uncertain future events to sharpen the issues and give them definition. *United Public Workers v. Mitchell*, 330 U.S. 75, 89-91 (1947). The issues are, therefore, lacking in the concreteness [*Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945)], ripeness [*Fortson v. Toombs*, 379 U.S. 621, 633 (1965)], and finality [*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154-55 (1951)] which are essential prerequisites to a determination by the federal courts under Article III even in cases brought under the Declaratory Judgment Act, which, as the Court has recognized "does not 'purport to alter the character of the controversies which are subject to the judicial power under the Constitution.' *United States v. State of West Virginia*, 295 U.S. 463, 475 (1935); *Poe v. Ullman*, 367 U.S. 497, 506 (1961). As Chief Judge John Brown emphasized in *Green*,

> "Whether answering that question would be difficult or not, it is an answer that ought not to be made with the imprimatur of law until such time as it is reasonably certain that the precise issue is presented. Obviously, we ought not to

express opinions which may turn out to be academic only relating to situations that never will be." 349 F.2d at 928.

It is clear, therefore, that the lower courts exceeded their jurisdiction in entering a declaratory judgment relieving Maryland Casualty of its obligation to pay any judgments which may be rendered against Stevens arising out of its sales of peanuts which had been overtreated with mercury.

CONCLUSION

For the reasons stated above, a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

EMMET J. BONDURANT, II

A. G. CLEVELAND, JR.
Attorneys for Petitioner.

Of Counsel:
Kilpatrick, Cody, Rogers, McClatchey
& Regenstein
1045 Hurt Building
Atlanta, Georgia 30303
522-7420

PROOF OF SERVICE

I, Emmet J. Bondurant, II, attorney for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1968, I served copies of the foregoing Petition on the respondent herein named, by mailing copies thereof in a duly addressed envelope, with postage prepaid, to Donald D. Rentz, Suite 401 C & S Bank Building, Albany, Georgia, attorney of record for respondent.

EMMET J. BONDURANT, II

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

Civil Action No. 586.

MARYLAND CASUALTY COMPANY,

Plaintiff,

versus:

STEVENS INDUSTRIES, INC.,

Defendant.

Memorandum Opinion and Order on Motions for Summary Judgment

Filed Dec. 15, 1966.

This is an action for declaratory judgment brought pursuant to the provisions of 28 U.S.C. § 2201. Defendant by way of counterclaim also seeks declaratory judgment. There appears to be no issue concerning any material fact appropriate for consideration in determining the basic issue involved in this case. There is controversy concerning material facts relating to secondary issues, but because of the direction which will be given the matter the controversy concerning secondary issues is unimportant at this stage.

Plaintiff issued to Defendant its comprehensive liability insurance policy which was in force and effect from July 1, 1964 until July 1, 1965. Various types of coverage were provided under the terms of this policy and under "coverage C" entitled "Property Damage Liability—Except Automobile" Plaintiff is obligated:

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident."

Under the terms of the policy Plaintiff also agreed to defend any suit brought against the insured (Stevens Industries, Inc.) alleging liability against the latter which is covered under the policy.

The above quoted provision of the policy is followed by certain Exclusions and Definitions. Exclusion (a) of the policy provides:

"This policy does not apply:

"(a) to liability assumed by the insured under any contract or agreement except under coverages A and C, (1) a contract as defined herein or (2) as respects the insurance which is afforded by the Products Hazard as defined, a warranty of goods or products;"

In the definitions section of the policy it is provided that:

"The word 'contract' means, if in writing, a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack easement, or elevator or escalator maintenance agreement."
and "Products Hazard" is defined in the policy as follows:

"The term 'products hazard' means

"(1) goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, if the accident occurs after possession of such goods or products has been relinquished to others by

the named insured or by others trading under his name and if such accident occurs away from premises owned, rented or controlled by the named insured or on premises for which the classification stated in division (a) of the declarations excludes any part of the foregoing; provided, such goods or products shall be deemed to include any container thereof, other than a vehicle, but shall not include any vending machine or any property, other than such container, rented to or located for use of others but not sold;

"(2) operations, including any act or omission in connection with operations performed by or on behalf of the named insured on the premises or elsewhere, whether or not goods or products are involved in such operations, if the accident occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the named insured; provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to an agreement; provided further, the following shall not be deemed to be 'operations' within the meaning of this paragraph: (a) pick-up or delivery, except from or onto a railroad car, (b) the maintenance of vehicles owned or used by or in behalf of the insured, (c) the existence of tools, uninstalled and equipment and abandoned or unused materials and (d) operations for which the classification stated in division (a) of the declarations specifically includes completed operations."

One of the businesses operated by the Defendant which was covered by the terms of this policy was that of processing peanuts for seed purposes and the subsequent sale of such peanuts so processed to farmers and retail seed dealers in a large area in southwest Georgia. During the early months of the year 1965 the Defendant processed

large quantities of such peanuts and sold them to purchasers as indicated. In the processing of the peanuts the nuts are removed from the hulls and are treated with a mercury compound, the purpose of the treatment being to enhance productivity. During the processing operation at the Defendant's plant the peanuts were accidentally subjected to an overtreatment with this chemical, which overtreatment rendered large quantities of the seed peanuts defective. Being unaware of this mistake, the Defendant sold and delivered and its purchasers bought and received large quantities of seed peanuts which were defective in varying degrees in that they failed to germinate at all in some cases, and failed to germinate in expected quantities in other cases, and in still other cases, having germinated, failed to produce expected crop yields. The result has been that large numbers of farmers and retail dealers have asserted claims against the Defendant and the Defendant has called upon the Plaintiff to defend, settle and satisfy the claims upon the theory that any liability of the Defendant with respect to these claims is covered by the liability insurance policy.

The Plaintiff has denied that the policy covers the Defendant's liability upon the claims, contending that the Plaintiff would not be liable to pay any judgment which was obtained against the Defendants by the claimants, and further, that since there is no coverage under the policy with respect to said claims that it does not owe any duty to the Defendant to defend against them. The Plaintiff urges that it is entitled to have this Court declare whether or not coverage of the claims is afforded to the Defendant under the terms of the policy and whether or not the Plaintiff owes any duty to defend against said claims, and to declare what the rights of the parties are under the insurance policy, and to this end the Plaintiff seeks a declaratory judgment.

On the other hand, the Defendant contends in its counterclaim that any liability of the Defendant by reason of the deficiencies in the seed peanuts is within the coverage of the aforesaid policy issued by the Plaintiff to the Defendant and alleges that it has demanded that the Plaintiff defend, settle, or satisfy all of such claims in accordance with the terms of the policy, and that the Plaintiff has refused the Defendant's demands, and that the defense of the numerous claims made upon the Defendant would be expensive and would extend over a long period of time and would result in a multiplicity of suits, and that the Defendant has fully performed and complied with all of the terms and conditions of the policy, and that the Defendant is entitled to a declaratory judgment determining that the claims of the farmers and retail seed dealers above referred to are within the coverage of the liability policy, and that the Plaintiff is liable to pay all judgments obtained against the Defendant by reason of said claims up to the limits of liability specified in the policy, and that the Plaintiff is obligated to defend, settle, or satisfy all claims against the Defendant arising out of the allegedly defective peanut seeds sold by it, and that the Plaintiff is liable to compensate Defendant for all compromises of said claims by the Defendant, together with expenses and attorney's fees.[1]

Plaintiff and Defendant have each filed motions for summary judgment and have supported their motions with affidavits and briefs and the Court has given careful consideration to all materials submitted.

It is clear from a reading of the provisions of the insur-

[1] A large number of claims have been filed with the Defendant and others are anticipated. At least one damage suit against the Defendant is pending and the filing of others is imminent. Since the Plaintiff has declined to recognize coverage the Defendant has negotiated settlement of some claims.

ance policy that for the insured to prevail it must appear that there was an accident after the seed peanuts were delivered to the purchasers and that that accident resulted in property damage. It is also clear that there was an accident which occurred involving the peanuts during the processing operation, but this occurred while the product was still in the possession of the insured, and all agree that that, standing alone, cannot be the basis of liability. The Defendant contends, however, that there was another accident, this being the failure of the seeds to germinate properly after they had come into the possession of the purchasers and that this "accident" resulted in property damage to the purchasers. The Plaintiff contends that the only accident involved was the one which occurred at the plant of the insured during processing and that the failure of the seeds to germinate was not an "accident" as contemplated by the terms of the policy, and further, that even if the failure of germination was an accident, it did not result in property damage to the purchasers.

This is a novel situation. Counsel for neither Plaintiff nor Defendant have called the Court's attention to any reported case involving similar facts and the Court's research has uncovered none.

We first consider whether the failure of the seeds to germinate properly was an "accident".

The word "accident" is derived from the Latin verb "accidere", meaning "to fall", or "to fall in", or "to fall upon", or "to befall", or "to happen". It will be noted, therefore, that the word "accident" is a word of action. It is a word of movement, of change, and it is difficult to conceive of a thing being the same after an accident as before the accident, which is simply another way of saying that the word "accident" connotes something affirma-

tive—not negative, something active—not passive. In this connection it is noted that it is not something that these seeds did that is complained of, it is something that they did not do. As we see it, the failure of the seeds to germinate was not an accident within itself, it was simply the result of an accident which occurred at the processing plant. The failure was not itself an accident, although the result was obviously unexpected. True, the accident at the processing plant resulted in later loss, but we do not regard the words "accident" and "loss" as synonymous.

Analogizing, let us suppose that an optometrist sets out to prepare a pair of contact lenses pursuant to prescription with intention to correct certain eye deficiencies and in grinding the lenses he accidentally uses an incorrect formula, so that when the lenses are delivered to the patient they are deficient in that they do not make adequate correction. Certainly there was an accident at the time the lenses were ground, but can it reasonably be said that there was another accident when the patient inserted the lenses without getting the expected result? We think not, because nothing happened. There was simply a failure to achieve the desired and expected result. On the other hand, if, because of accidental procedures the optometrist improperly ground the lenses so as to leave sharp edges which caused painful cuts or scratches under the eyelid when inserted, then there would be two accidents, one when the lenses were ground, and another when the patient used them, because in this instance the patient was cut and scratched—something happened. There was action. There was an accident.

Further, if we would relate the thought to tangible property, let us suppose a housewife buys a machine to clean her floors and when she plugs it in the electrical outlet nothing happens—it does not operate as anticipated because of some accident in manufacture at the plant

where the apparatus was made. Can it be said that the failure of the machine to operate is an accident? We think not.[2] Or, let us suppose that the machine operated but only at about 50% efficiency. Still there has been no accident—there has simply been a failure to produce to the degree expected.[3] On the other hand, if, when she plugs the machine in and moves it across the floor it makes cuts and scratches on the floor, then there have been two accidents, one at the manufacturing plant when the machine was made and another at the time she used it, because something happened. The machine didn't just fail to operate, or, operating, fail in efficiency. There was action resulting in damage. It didn't just fail to do the job expected, it did something else which damaged the realty.

In the excellent briefs filed by Counsel for the Defendant in this case our attention has been called to some cases decided in other jurisdictions involving an interpretation of language similar to that found in this policy of insurance with which we are here concerned, in which cases the Courts have held that under the circumstances of those cases there was an accident, and by reference to these cases Counsel seek to persuade us that there was an accident here. These cases referred to are *Bowman Steel Corporation, etc. v. Lumbermen's Mutual Casualty Company,* 364 F.2d 246 (3 Cir. 1966); *Pittsburgh Plate Glass Company v. Fidelity and Casualty Company of New York,* 281 F.2d 538 (3 Cir. 1960); *Bundy Tubing Company v. Royal Indemnity Company,* 298 F.2d 151 (6 Cir. 1962); *Hauenstein v. St. Paul—Mercury Indemnity Company,* 65 N.W. 2d 122 (Minn. 1954); and *Dakota Block Company v. Western Casualty Surety Company,* 132 N.W. 2d 826 (S.D. 1965). We have carefully reviewed these cases

[2] Some of the defective seed involved in this case did not germinate.

[3] Some of the defective seed germinated but did not produce an adequate crop.

and we are impressed that in each of them something affirmative happened. There was motion or there was change and the happening resulted in observable property damage. In Bowman the asbestos felt separated from the steel sheets to which it had been laminated, exposing the steel to the elements and damaging the property. In Pittsburgh the paint peeled off, causing the jalousies to rust and deteriorate. In Bundy the water pipes burst, causing leakage and damage to the structure in which the pipes were used. In Hauenstein the plaster shrunk and cracked, causing damage to the structure. In Dakota the blocks cracked and changed color, causing damage to the realty. In each of these cases it is understandable how the Court could conclude that there had been an accident after the product had been delivered to the purchaser, and in this case if the planting of these peanut seed which had been overtreated with a chemical had brought about chemical change in the farmer's soil making the soil unfit for the growth of vegetation, we would consider that the cases cited by Counsel were persuasive and we would conclude that there had been an "accident", but when the only contention made is that the seeds have simply failed to germinate and produce as anticipated, we conclude that there has been none.

Courts have no more right by strained construction to make an insurance policy more beneficial by extending the coverage contracted for than they would have to increase the amount of the insurance. The insurance here is not simply against the results of any accident, but only against the results of an accident which occurs after possession of the product had been relinquished to others by the insured. If the purchaser's loss is solely the result of the accident which occurred during the processing operation, as we believe it to be, then the policy does not cover the case.

Having concluded that there was no accident as contemplated by the terms of the policy, we do not reach the question whether the failure of the seed to germinate properly resulted in property damage.

Accordingly, Plaintiff's motion for summary judgment will be granted and Defendant's motion for summary judgment will be denied. Counsel for Plaintiff will submit a suggested form of judgment to be entered.

It Is So Ordered this 15th day of December, 1966.

J. ROBERT ELLIOTT,
United States District Judge.

JUDGMENT.

Filed Dec. 23, 1966.

In the United States District Court for the Middle District of Georgia, Americus Division.

Maryland Casualty Company, Plaintiff,

vs.

Civil Action No. 586.

Stevens Industries, Inc., Defendant.

For the reasons set forth in the Court's "Memorandum Opinion and Order on Motions for Summary Judgment" filed in this matter on December 15, 1966, it is ordered that the Plaintiff's motion for summary judgment should be and the same is hereby sustained and the Defendant's cross-motion for summary judgment should be and the same is hereby overruled.

It is further declared to be the judgment of this Court that the Maryland Casualty Company comprehensive liability insurance policy No. 31-198136 issued to Stevens

Industries, Inc., does not provide coverage for any claims by farmers or dealers asserted against Stevens Industries, Inc. as a result of the failure of seed peanuts sold by Stevens Industries, Inc. during the period from July 1, 1964 to July 1, 1965 to germinate in expected quantities or produce in expected quantities because of an alleged overtreatment of said seed peanuts with a mercury compound by Stevens Industries, Inc. This judgment applies to all such claims referred to in the instant action. It is the further judgment of this Court that Maryland Casualty Company is not liable to pay any judgment obtained or any compromise settlement made arising out of any claim above referred to, nor is Maryland Casualty Company required under the terms of said policy to investigate, appear, answer, defend, or settle any claim above referred to.

The Court having been advised by counsel for Stevens Industries, Inc. of counsel's intention to file an appeal from this judgment, it is directed that the restraining order which was issued by this Court on November 21, 1966 restraining the further prosecution of Case No. 3715 now pending in the Superior Court of Mitchell County, Georgia, shall remain in force and effect according to its terms until further order of this Court.

This the 22nd day of December, 1966.

J. ROBERT ELLIOTT,
United States District Judge.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24439

STEVENS INDUSTRIES, INC.

Appellant,

versus

MARYLAND CASUALTY COMPANY,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(February 7, 1968.)

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge: This is an appeal from a judgment of the United States District Court for the Middle District of Georgia granting a motion for summary judgment in favor of Maryland Casualty Company (Maryland) in a declaratory judgment action brought by it as the comprehensive liability insurer of Stevens Industries, Inc. (Stevens). Stevens also sought declaratory judgment by means of counterclaim. The court held that Maryland was not liable to defend or pay judgments resulting from claims asserted by farmers against Stevens, arising out of the sale of defective peanut seeds. From this judgment Stevens has appealed.

The question we must decide is whether under the terms of the insurance contract there was coverage. We

conclude that the district court correctly found there was not, and affirm.

Stevens is a Georgia corporation engaged in the business of the manufacture, sale, and processing of agricultural products, including the processing and sale of peanuts for use as seed by farmers and dealers in southwest Georgia.[1] As a part of its processing procedure the peanuts are removed from their shells and treated with a mercury compound in order to enhance productivity. During the period of approximately March to May of 1965, Stevens accidentally overtreated the seed peanuts. Without realizing the mistake, the seeds were then sold to various dealers and farmers. As a result numerous claims for damages have been made by the purchasers who contend that the excess application of the mercury compound caused the seeds to be defective in that some failed to germinate at all, while others reacted in various ways as follows: germinated but soon died; germinated, lived, but failed to produce; or germinated, lived, bore, but produced in less than expected quantities. At the time Maryland filed its suit for declaratory judgment only one suit had actually been filed against Stevens, but many others were threatened and imminent. Some of the farmers' claims for damages were based on the contention that the crop yield would have been greater if the seed had not been defective. Other claimants contended that they suffered a reduction in yield below an "average yield" or that their crop yield was substandard. In some instances it was asserted that the seed germinated but the plants failed to produce and died. The damages claimed also included such items as plowing expenses, cost of insecticides, fertilizers, land preparation, replacement seed and

---

[1] The total seed sales of defendant for the crop year 1965 amounted to $635,154.69.

land rental charges. Many of these claims were settled by Stevens prior to its notification of Maryland on July 5, 1965. The facts with respect to the nature of the claims, the settlements effected and the contentions of the parties were fully developed.

Maryland had issued a comprehensive liability policy to Stevens on July 1, 1964, which was in effect throughout the period in question. Maryland received a specific premium of $71.00 in return for providing protection under Coverage C of the policy, entitled "Property Damage Liability—Except Automobile." This clause obligated Maryland "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, *caused by accident.*" (Emphasis supplied) In addition, Maryland also agreed to defend any action brought against Stevens alleging liability covered under the policy. Exclusion (A) of the policy provided:

> "This policy does not apply: (A) to liability assumed by the insured under any contract or agreement except under coverages A & C, (1) a contract as defined herein or (2) as respects the insurance which is afforded for the Products Hazard as defined, a warranty of goods or products;"

In the definition section of the policy, the word "contract" is defined as follows: "The word 'contract' means, if in writing, a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement, or elevator or escalator maintenance agreement." In addition, "Products Hazard" is defined as "(1) Goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name,

if the accident occurs after possession of such goods or products has been relinquished to others by the named insured or by others trading under his name and *if such accident occurs away from premises owned, rented, or controlled by the named insured* or on premises for which the classification stated in Division (a) of the declarations excludes any part of the foregoing." (Emphasis added)

Both parties agree that Maryland is not liable under the terms of the policy for the accident which occurred within Stevens' own plant resulting from the overtreatment with the mercury compound. The disagreement occurs over whether or not there was a second accident which occurred after the seeds left the plant. Stevens contends that a second accident occurred when the excess mercury compound unexpectedly prevented some seeds from germinating and others from fully developing into mature plants. Maryland contends that the only accident in this case occurred within Stevens' own plant and that even if there were a second accident, there was no requisite "injury to property". Both parties filed motions for summary judgment, supported with affidavits and briefs. The district court, after a careful consideration of all materials submitted, found that there was no second accident occurring after the seed peanuts left the plant. The issue of whether there was an injury to property was therefore never reached.

Jurisdiction in this case is based upon diversity of citizenship and thus Georgia law is controlling. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). However, despite diligent search by the able counsel for both sides, neither has been able to point to any Georgia law directly in point under the facts presented here. Nor has our independent research revealed any. We therefore occupy the position of deciding this case as the Georgia courts would

decide it if confronted with these facts. *Birkett L. Williams Company v. Smith*, 353 F.2d 60 (5 Cir. 1965); *U. S. Fidelity & Guaranty Co. v. Anderson Construction Company*, 260 F.2d 172 (9 Cir. 1958). Certain general principles of Georgia contract law are clear. Contracts of insurance, being contracts of adhesion drawn by the legal draftsmen of the insurer are to be "construed as reasonably understood by the insured." *Loftin v. United States Fire Insurance Company*, 106 Ga. App. 287, 127 S.E.2d 53 (1962). Insurance policies are to be interpreted liberally in favor of coverage of the insured. *Johnson v. Mutual Life Insurance Company*, 154 Ga. 653, 115 S.E. 14 (1922). When the insurer relies on an exclusionary clause of the policy it has the burden of proving that the facts upon which the asserted claim is based came within the exclusion. *State Mutual Life Assurance Co. v. Dorsey*, 357 F.2d 600 (5 Cir. 1966), *Darby v. Interstate Life & Accident Insurance Co.*, 107 Ga. App. 409, 130 S.E.2d 360 (1963). Nevertheless, where the terms and conditions of the policy are clear and unambiguous, the court must declare and enforce the contract as made between the parties. *Nelson v. Southern Guaranty Insurance Company*, 221 Ga. 804, 147 S.E. 2d 424 (1966), *Andrews v. Georgia Mutual Insurance Company*, 110 Ga. App. 92, 137 S.E.2d 746 (1964).

The district court based its finding that the failure of the seeds to properly germinate and produce did not constitute a distinct accident within the meaning of the policy on the rationale that the word "accident" is a term "of movement, of change . . . something affirmative—not negative, something active—not passive."[2] The cases[3] by

---

[2] On this aspect of the case the district court concluded as follows:

"The word 'accident' is derived from the Latin verb 'accidere', meaning 'to fall', or 'to fall in', or 'to fall upon', or 'to befall', or 'to happen'. It will be noted, therefore, that the word 'accident' is a word of action. It is a word of movement, of change, and it is diffi-

which counsel for Stevens attempted to persuade the court below that a second accident did occur within the meaning of similar policies and under similar circumstances were distinguished by the trial judge on the basis that "in each of them something affirmative happened. There was motion or there was change and the happening resulted in observable property damage." For example, in the *Hauenstein* case, collated in footnote 3 above, the court found that the cracking, as a result of shrinkage, of acoustical plaster installed by the insured was an accident within the meaning of a comprehensive liability policy similar to the one in the present case. The trial court emphasized the affirmative nature of the action of shrinking

---

cult to conceive of a thing being the same after an accident as before the accident, which is simply another way of saying that the word 'accident' connotes something affirmative—not negative, something active—not passive. In this connection it is noted that it is not something that these seeds did that is complained of, it is something that they did not do. As we see it, the failure of the seeds to germinate was not an accident within itself, it was simply the result of an accident which occurred at the processing plant. The failure was not itself an accident, although the result was obviously unexpected. True, the accident at the processing plant resulted in later loss, but we do not regard the words 'accident' and 'loss' as synonymous."

* * * * *

". . . in this case if the planting of these peanut seed which had been overtreated with a chemical had brought about chemical change in the farmer's soil making the soil unfit for the growth of vegetation, we would consider that the cases cited by Counsel were persuasive and we would conclude that there has been an 'accident', but when the only contention made is that the seeds have simply failed to germinate and produce as anticipated, we conclude that there has been none."

[3] Bowman Steel Corporation v. Lumbermens Mutual Casualty Company, 364 F.2d 246 (3 Cir. 1966); Pittsburgh Plate Glass Company v. Fidelity and Casualty Company of New York, 281 F.2d 538 (3 Cir. 1960); Bundy Tubing Company v. Royal Indemnity Company, 298 F.2d 151 (6 Cir. 1962); Hauenstein v. St. Paul-Mercury Indemnity Company, 242 Minn. 354, 65 N.W.2d 122 (1954); and Dakota Block Company v. Western Casualty Surety Company, 132 N.W.2d 826 (S.D. 1965). In addition to the cases cited by appellant see also the recent case of Economy Mills of Elwell, Inc. v. Motorists Mutual Insurance Co., 36 L.W. 2379 (Mich. Ct. of App., Nov. 29, 1967).

and eracking, causing damage to the structure. We agree that this affirmative action test may often be a useful concept in cases of this type. What happened here is that an accident occurred in Stevens' plant which resulted in a later loss. We agree with the reasoning of the District Judge to the effect that the failure of the seed to germinate properly was not an accident, but rather was the result of the accident which happened at the plant when the seed were on the premises of the insured. In essence the claims against Stevens seek damages because of something the seeds failed to do, i.e., produce in expected quantities, not because of something the seeds affirmatively did. The district court was justified in holding that no second accident occurred. In addition, to hold that liability exists in this case would, in effect, be to convert an accident policy into a policy providing protection by Maryland against any breach of warranty by Stevens that its product would react or produce in a certain manner. Such a position is especially untenable in the light of the fact that the premium paid by Stevens was only $71.00, whereas the productive qualities of over $600,000 worth of seed would be guaranteed.

Appellant places great emphasis on the case of *St. Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361 (8 Cir. 1966). In that case Northern Grain Company sought a declaratory judgment holding that its liability insurer was required to defend any claim and pay any judgment against the company caused by the sale of the wrong type of seed wheat. The facts revealed that Northern sold and delivered to its customers wheat which it believed to be Selkirk seed wheat. It turned out that the seed wheat was actually a less valuable and less desirable variety known as Conley wheat. The difference can only be detected when the wheat heads appear. As soon as the mistake was discovered numerous claims were asserted

by the purchasers. The insurance policy in that case was very similar to the policy in the instant case except for one crucial item. Instead of providing for coverage for "accident" only the policy in *Northern Grain* provided coverage of an "accident or occurrence". The court in *Northern Grain* failed to explicitly state whether it was finding an occurrence, an accident, or both and seemed to use the terms interchangeably.[4] It held that Northern Grain was covered by the policy. An "occurrence" is a broader and more encompassing term than "accident".[5] In our view there is a clear distinction in the coverage provided by the policy in the *Northern Grain* case and the policy in the instant case. In any event, whether termed an accident or an occurrence, it is rather clear that the unintentional choice and sale of the wrong type of seed is closer to the concept of accident than are the events in this case which occurred after the seed were purchased and taken from the Stevens plant. It is admitted that the accident in the Stevens plant is not covered. Rather than providing comfort to the appellant, the case tends to support the district court's conclusion that there was no accident in this case after the seed left the premises of Stevens, even though there may have been an occurrence.

---

[4] The court stated its conclusion by using the following language:

". . . we are of the firm view, and so hold, that the occurrence under consideration satisfies the requirement that the claimed damages were caused by accident."

[5] Webster's Third New International Dictionary (1961) defines the terms as follows:

"Accident—an event or condition occurring by chance or arising from unknown or remote causes; . . . a sudden event. . . ."

"Occurrence—something that takes place. . . ."

These terms were dealt with by the court in Aerial Agricultural Service of Montana, Inc. v. Till, 207 F.Supp. 50 (D.C.N.D. Miss. 1962) in which the court delineated the following distinction:

"To begin with, the word 'occurrence', to the lay mind, as well as to the judicial mind, has a meaning much broader than the word 'accident'. As these words are generally understood, accident means something that must have come about or happened in a certain

The cases of *E. K. Hardison Seed Company v. Continental Casualty Company,* .... Tenn. App. ...., 410 S.W.2d 729 (1967) and *St. Paul Mercury Insuranee Company v. Sugarland Industries, Inc.,* 406 S.W.2d 778 (Tex. Civ. App. 1966) lend further support to the finding that there was no accident. In the *Hardison* case the insured erroneously sold seeds to a purchaser warranting that they would produce green beans. In fact they produced white beans which were less valuable. The seed company was insured under a policy the material provisions of which were practically identical to those of the present case. The chancellor emphasized there was no damage to property caused by accident as required by the policy. It was pointed out "that the only thing that had occurred which could possibly be termed an accident was the selecting and furnishing of the wrong seed to the customers, which had not occurred after possession of the (seed beans) had been relinquished by the (seed company). . . ." The Tennessee Court of Appeals in affirming the chancellor concluded "there is simply nothing to suggest an accident. . . . So, unless every unfulfilled warranty or representation is an accident, we must hold that (the) declaration describes a plain, clear, classical case of breach of warranty involving no element of accident whatsoever."

In *St. Paul-Mercury Ins. Co. v. Sugarland Ind., Inc.,* 406 S.W.2d 778 (Tex. Civ. App. 1966) the insured under a

---

way, while occurrence means something that happened or came about in any way. Thus *accident* is a special type of *occurrence*, but occurrence goes beyond such special confines and, while including accident, it encompasses many other situations as well." (emphasis in original)

* * * * *

"It would, therefore, seem that from the usual and ordinary meaning of the words used the word 'occurrence' extends to events included within the term 'accident' and also to such conditions, not caused by accident, which may produce an injury not purposely or deliberately."

policy similar to the policy in the instant case warranted that certain cotton seed had a germination rate of 80% when in fact they did not. A purchaser of the seed sued the insurer, but the court held that this case was simply one for breach of warranty. "There were no pleadings nor findings nor evidence of negligence or accident after [the purchaser] received the seed. The dead seed failed to sprout resulting in lost profits, but there was no accident. . . ." Although the above two cases are not identical to the situation here under consideration, they are highly analogous and very persuasive on the issue of whether an accident occurred.

In view of all that has been said above we conclude that the trial court was justified in finding that there was no accident occurring away from the premises and after possession of the seed peanuts had been relinquished by Stevens.[6] This makes it unnecessary to decide the question of whether there was any "injury to property" within the meaning of the policy.

One other point raised by Stevens should be considered. Stevens argues that Maryland's complaint insofar

---

[6] The following is from the trial court's memorandum opinion:

"The insurance here is not simply against the results of any accident, but only against the results of an accident which occurs after possession of the product had been relinquished to others by the insured. If the purchaser's loss is solely the result of the accident which occurred during the processing operation, as we believe it to be, then the policy does not cover the case."

[7] The judgment of the district court filed December 23, 1966, provides in part that the insurance policy issued by Maryland did not cover any claims,

". . . by farmers or dealers asserted against Stevens Industries, Inc. as a result of the failure of seed peanuts sold by Stevens Industries, Inc. during the period from July 1, 1964 to July 1, 1965 to germinate . . . or produce in expected quantities. . . . Maryland Casualty Company is not liable to pay any judgment obtained or any compromise settlement made arising out of any claim above referred to, nor is Maryland Casualty Company required under the terms of said policy to investigate, appear, answer, defend, or settle any claims above referred to."

as it sought a determination that it was under no obligation to pay any judgment which might be rendered against Stevens presented only an abstract, hypothetical question over which the district court had no jurisdiction, since there was no "case or controversy" as required by Article III of the Constitution. In support of this contention Stevens argues that a broad judgment such as was entered by the district court[7] can only be justified if no state of facts could be proven which would fall within the policy and impose liability. *Green v. Aetna Insurance Company*, 349 F.2d 919 (5 Cir. 1965). In the instant case all of the claims must, of necessity, be based upon a breach of either an express or an implied warranty of quality of the seed arising out of a failure of the seed to germinate properly and yield in expected quantities which was caused by the accidental overtreatment with the mercury compound and which admittedly occurred at the Stevens plant. In the instant case the facts with respect to the asserted claims were fully developed and known. The parties presented their respective contentions to the district court thoroughly and completely. We see no good reason, in the circumstances and under the facts here presented, to require further proceedings in the district court. The issues have been fairly presented for consideration and we think the district court properly and correctly decided those issues. The declaratory judgment in this case was properly entered.

After considering all other contentions asserted by the appellant, and finding them to be without merit, the judgment of the district court is hereby AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24439

D. C. Docket No. 586-Civil Action

STEVENS INDUSTRIES, INC.,

Appellant,

versus

MARYLAND CASUALTY COMPANY,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Stevens Industries, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 7, 1968

Issued as Mandate: Feb. 29, 1968

APPENDIX C

Excerpts from Maryland Casualty Company Comprehensive General-Automobile Liability Policy

INSURING AGREEMENTS

Coverage C—Property Damage Liability—Except Automobile: To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

Defense, Settlement, Supplementary Payments: With respect to such insurance as is afforded by this policy, the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient; R. 8.

EXCLUSIONS

This policy does not apply:

(a) to liability assumed by the insured under any contract or agreement except under coverages A and C . . . or (2) as respects the insurance which is afforded for the Products Hazard as defined, a warranty of goods or products;

CONDITIONS

(g) Products Hazard. The term "products hazard" means

(1) goods or products manufactured, sold, handled or distributed by the named insured . . . if the

accident occurs after possession of such goods or products has been relinquished to others by the named insured . . . and if such accident occurs away from premises owned, rented or controlled by the named insured . . .

(2) operations, including any act or omission in connection with operations performed by or on behalf of the named insured on the premises or elsewhere, whether or not goods or products are involved in such operations, if the accident occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the named insured; provided, operations shall not be deemed incomplete because improperly or defectively performed . . . R. 10.

APPENDIX D

Excerpts from Record as to Nature of Farmers' Claims Against Stevens Industries

Defendant's Fifth Defense*

"Some of these farmers claim that because of the alleged defect, these seeds did not produce in expected quantities in many cases and failed to produce at all in other cases causing injury to the property of said farmers in that many of said farmers incurred expense in replanting their crops and many of such farmers, in part or completely, lost the use of their farm land because of the allegedly defective seeds and were allegedly able to harvest only crops which were substantially less than they would have been able to do if they had not used the allegedly defective seeds. *Examinations by defendant revealed that, as to some instances in which the farmers claim that the seeds failed to produce because they were defective, the seeds did actually germinate and produced a plant which, in some instances, died and, in other instances, merely failed to mature to the extent of producing peanuts.* The items of expense incurred by these farmers in planting the seed peanuts which they claim were defective were, generally, as follows: transportation of seed, herbicides and fertilizers to the fields; disking the fields; first harrowing of the fields; second harrowing of the fields; planting; application and cost of herbicide and fertilizer; cost of seed; and, land rent or value of use of land. The cost of seed peanuts accounted for only a fraction of the total cost per acre of the planting by the farmers of these seed peanuts which they claimed were defective." R. 70-71. (Emphasis supplied).

---

* Respondent expressly based its motion for summary judgment upon the answer and counterclaim of petitioner. R. 190.

Defendant's First Counterclaim

* * *

"*Examinations by defendant revealed that, as to some instances in which the farmers claim that the seeds failed to produce because they were defective, the seeds did actually germinate and produced a plant which, in some instances, died and, in other instances, merely failed to mature to the extent of producing peanuts.* The items of expense incurred by these farmers in planting the seed peanuts which they claim were defective were, generally, as follows: transportation of seed, herbicides and fertilizers to the fields; disking the fields; first harrowing of the fields; second harrowing of the fields; planting; application and cost of herbicide and fertilizer; cost of seed; and, land rent or value of use of land. The cost of seed peanuts accounted for only a fraction of the total cost per acre of the planting by the farmers of these seed peanuts which they claimed were defective." R. 72. (Emphasis supplied).

Defendant's Answer to Plaintiff's

Second Interrogatories

"Interrogatory #5

. . . The percentage failure to produce in expected quantities and the percentage failure of germination may not be the same depending on the use of the word "germination". In the generally accepted sense of the word "germination", the alleged defective seeds did properly germinate but did not grow into productive plants. In the technical sense, whether or not there was a failure of germination would depend upon a determination of the exact point when the process of germination is complete. In any event, *the alleged defective seeds did produce plants* but the growers claim that, as a result of the alleged over-treatment with mercury compounds, the seeds

produced plants but the alleged defective seeds caused the plants to either die or fail to develop so that the affected plants did not produce any peanuts at all." R. 100. (Emphasis supplied).

Letter from Graco Fertilizer Company
May 28, 1965

* * *

"Some of the above have planted the 3rd time, some have planted at least twice, all have used Falone Di-Nitro for weed control. *The peanuts that come thru to 25% to 50% stand have now practically all died back.* We have insisted that they plant again, but the dry weather has hindered most of this.

The largest grower planted over twice with your seed and had the same results. *The peanuts bulge the ground as though they were coming through,* this is why the weed treatment. The growers are very much disturbed, and want an adjustment to compensate for their loss. Some of these growers have the allotments rented, planted two to three times, and the treatment for weeds make for an expensive try." R. 130. (Emphasis supplied).

* * *

Report on Perry Franklin Peanuts

"Mr. Franklin bought from Fudge Gin 2 tons Virginia Bunch 67 Peanut Seed and 450 Lbs. of Argentine Spanish Peanut Seed, which were planted on approximately 61 acres. *I walked over the peanuts with Mr. Franklin and found that the peanuts were skippy, odd plants with stunted growth, unusual root systems, skippy rows* as have been noted in other fields with a mixture of Runners and Spanish in the fields where the Bunch were planted, (approximately 10% Runners, 2% Spanish). No mixture of varieties where the Spanish were planted but stand conditions were the same—approximately 70% stands." R. 140. (Emphasis supplied).

Letter from R. D. Smith Insurance Agency, Inc.

* * *

"I told them that I feel that the position taken by the Company in this instance is incorrect, our thinking being that the farmer bought these seed in good faith, planted them on his land which had been prepared for planting at his expense *and the seed germinated and produced a plant which later died.* I contend that this plant was his property and said property was destroyed and therefore the policy should provide coverage in the event Stevens Industries, Inc. is later proven liable in the case." R. 198 (Emphasis supplied).

Harry G. McGahee v. Walter Pollack

d/b/a Walter Pollack and Stevens Industries, Inc.,

Superior Court of Mitchell County, Georgia

Petition

* * *

"9. The said seed peanuts were not good seed peanuts, and were not fit or suitable to be planted in that they had been treated with an excessive amount of a mercury compound, which said excessive treatment *caused slow emerging peanut seedlings with a fat sprout or leg, commonly known and called by the name 'Big Leg'.*

"10. By reason of said treatment with an excessive amount of a mercury compound, only a *small portion of said seed peanuts would grow or could be made to grow, and those seed peanuts which did sprout and begin to grow were afflicted with 'Big Leg'.*" R. 206 at 208. (Emphasis supplied).